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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 CHRISTOPHER W. HESSE, et al.,

11 Plaintiffs,

12 v.

13 SPRINT SPECTRUM, L.P., et al.,

14 Defendants.

CASE NO. C06-0592JLR

ORDER REGARDING
DISCOVERY PRIOR TO
MOTION TO COMPEL
ARBITRATION AND FOR
RELIEF FROM DEADLINE

15 I. INTRODUCTION

16 Before the court is Plaintiffs' motion for an order permitting limited discovery and
17 an extension of time in the briefing schedule (Dkt. # 256) with regard to Defendant Sprint
18 Spectrum, L.P., d/b/a Sprint PCS's ("Sprint PCS") pending motion to compel arbitration,
19 de-certify the class, and dismiss the action (Dkt. # 253). Having reviewed the motion, all
20 papers filed in support and opposition thereto, and being fully advised, the court
21 GRANTS in part and DENIES in part Plaintiffs' motion (Dkt. # 256). In addition, the
22 court STRIKES Sprint PCS's motion to compel arbitration from the calendar without

1 prejudice to re-filing following the limited discovery permitted by the court as described
2 below.

3 **II. BACKGROUND**

4 This is a class action by current and former Sprint PCS subscribers in Washington
5 State. In this action, Plaintiffs challenge Sprint PCS's alleged practice of billing its
6 customers an added charge for its Washington State business and occupation ("B&O")
7 taxes. (*See generally* Consol. Compl. (Dkt. # 118).) Plaintiffs allege this practice
8 violates Washington's statutory prohibition on treating B&O taxes as taxes on
9 consumers. (*See id.* ¶ 2.1 (citing RCW 82.04.500).)

10 Plaintiffs Christopher W. Hesse and Nathaniel Olson filed separate lawsuits in
11 King County Superior Court for the State of Washington in 2006. (*See* Notice of
12 Removal (Dkt. # 1); Show Cause Order (Dkt. # 24).) Defendants removed both cases to
13 federal court, and they were consolidated in the present action. (*See* Notice of Removal;
14 Min. Ord. re: Consol. (Dkt. # 33).) Plaintiffs seek a declaratory judgment and injunction
15 against Sprint PCS's alleged practice, along with damages under Washington's
16 Consumer Protection Act, RCW ch. 19.86, and restitution for unjust enrichment. (*See*
17 *generally* Consol. Compl.)

18 Over the next five years, the parties litigated a number of issues, but never an issue
19 concerning arbitration. In 2007, the court granted Plaintiffs' motion for class certification
20 (Dkt. # 117). Defendants moved to dismiss all claims predicated on the B&O tax as
21 preempted by the Federal Communications Act ("FCA") (Dkt. # 138). Defendants later
22 moved for summary judgment of the remaining claims based on a class settlement in

1 Kansas (Dkt. # 176). Each of these defenses was rejected on appeal. *See Hesse v. Sprint*
 2 *Specturm, L.P.*, 598 F.3d 581 (9th Cir. 2010).

3 On remand, Sprint PCS moved for summary judgment again on the merits (Dkt. #
 4 216), which Plaintiffs opposed (Dkt. # 231). The court then stayed the action pending a
 5 decision from the Washington Supreme Court on a materially similar case against
 6 Cingular Wireless. (Order (Dkt. # 243).) Never, during all these years of litigation, did
 7 Defendants assert that Plaintiffs' claims were subject to arbitration.

8 On April 27, 2011, the Supreme Court issued its decision in *AT&T Mobility LLC*
 9 *v. Concepcion*, --- U.S. ---, 131 S. Ct. 1740 (2011), which held that the Federal
 10 Arbitration Act ("FAA") preempted California's *Discover Bank* rule,¹ which had held
 11 that an arbitration agreement in a consumer contract setting could be found to be
 12 unconscionable because it included a universal class action waiver. On September 14,
 13 2011, Sprint PCS moved the court to lift the stay in this matter to permit Sprint PCS to
 14 file a motion to compel arbitration in light of the change wrought in the law by the
 15 Supreme Court's decision in *Concepcion* (Dkt. # 244). The court lifted the stay for this
 16 limited purpose (Dkt. # 252), and Sprint PCS filed its motion to compel arbitration, de-
 17 certify the class, and dismiss the action (Dkt. # 253).

18 In response, Plaintiffs filed the present motion seeking limited discovery with
 19 regard to the issue of arbitration and an extension of time to respond to Sprint PCS's
 20 motion to compel arbitration. (Mot. (Dkt. # 256).) Specifically, Plaintiffs seek discovery

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 22 ¹ *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), overruled *Concepcion*, ---
 U.S. ---, 131 S.Ct. 1740.

1 with regard to two issues: (1) whether an agreement to arbitrate was formed (*id.* at 5-6;
2 Reply (Dkt. # 258) at 3-4), and (2) whether the alleged arbitration agreement will
3 preclude Plaintiffs from enforcing their statutory rights (Mot. at 6-8; Reply at 4-5).

III. ANALYSIS

5 Although discovery in this matter has been closed, the court finds that Plaintiffs'
6 motion seeking additional discovery concerning Defendants' motion to compel
7 arbitration is timely. Defendants did not move to compel arbitration until November 16,
8 2011, more than five years following the filing of the complaint. (*See* Mot. to Compel
9 Arb. (Dkt. # 253).) Defendants assert that it would have been futile for them to move to
10 compel arbitration prior to the Supreme Court's decision in *Concepcion*, --- U.S. ---, 131
11 S.Ct. 1740, which fundamentally changed the jurisprudence in the Ninth Circuit
12 governing arbitration agreements. (Mot. to Compel Arb. at 1.) The court agrees with this
13 assessment, but the fact that Defendants did not move to compel arbitration until recently
14 means that Plaintiffs previously had no reason to seek or conduct discovery with regard
15 to arbitration issues. *Laguna v. Coverall N. Am., Inc.*, No. 09cv2131 (BGS), 2011 WL
16 3176469, at *3 (S.D. Cal. July 26, 2011) ("Defendants filed the motions to compel
17 arbitration well into the case, and should have known that as a result, Plaintiffs might
18 need to conduct limited discovery to investigate the enforceability of the arbitration
19 clause."). Now that the need has arisen, Plaintiffs must be afforded an opportunity to
20 gather appropriate evidence. *See id.* (granting plaintiff's request to reopen discovery
21 when motion for discovery was filed in good faith soon after defendants filed motions to
22 compel arbitration); *Plows v. Rockwell Collins, Inc.*, No. SACV 10-01936 DOC

1 (MANx), 2011 WL 3501872, at *5 (C.D. Cal. Aug. 9, 2011). Nevertheless, the FAA
 2 “calls for a summary and speedy disposition of motions or petitions to enforce arbitration
 3 clauses.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983).
 4 Accordingly, Plaintiffs are entitled to only limited discovery concerning those factual
 5 issues specifically implicated by Defendants’ motion to compel arbitration.

6 Plaintiffs assert that they are entitled to discovery concerning whether Plaintiffs
 7 entered into an agreement to arbitrate. (Mot. at 5-6; Reply at 4.) The Ninth Circuit Court
 8 of Appeals has held that “[t]he FAA provides for discovery and a full trial only if ‘the
 9 making of the arbitration agreement or the failure, neglect, or refusal to perform the same
 10 be in issue.’” *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999) (quoting 9
 11 U.S.C. § 4)). “[T]he making of the arbitration agreement is in issue if the plaintiff alleges
 12 that the arbitration clause was fraudulently induced, that one party had overwhelming
 13 bargaining power, or that the agreement does not exist.” *Hibler v. BCI Coca-Cola
 14 Bottling Co. of L.A.*, No. 11-CV-298 JLS (NLS), 2011 WL 4102224, at *1 (S.D. Cal.
 15 Sept. 14, 2011) (citing *Granite Rock Co. v. Int’l Broth. of Teamsters*, --- U.S. ---, 130 S.
 16 Ct. 2847, 2856 (2010); *Buckeye Check Cashing, Inc. v. Cardegn*a, 546 U.S. 440, 445
 17 (2006); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1269-70 (9th Cir. 2006)).

18 Plaintiffs assert that they need this discovery because “whether the [arbitration]
 19 clause was agreed to” is in dispute. (Mot. at 5-6.) The court, however, disagrees. The
 20 argument that the formation of the arbitration agreement is in dispute has been foreclosed
 21 by Plaintiffs’ prior admissions. In an earlier motion for partial summary judgment,
 22 Plaintiffs expressly stated that their “relationship” with “Sprint is governed by the Terms

1 & Conditions of Service, which sets forth the general terms, and a ‘service plan,’ which
 2 sets forth the specific rates and features of the plan.” (Pl. Resp to Mot. for S.J. (Dkt. #
 3 185) at 1; *see also* Pl. Mot for Part. S.J. (Dkt. # 175) at 2; *id.* at 6 (admitting that “[t]he
 4 Terms & Conditions agreement . . . governs the relationship between Plaintiffs and
 5 Sprint . . .”); *see* November 1, 2011 Terms & Conditions (Dkt. # 175-2) Ex. 1 at
 6 SPRINT-PCS-HO 000025) (“Your agreement (“Agreement”) with Sprint Specturm L.P.
 7 . . . is made up of these Terms and Conditions (“Terms”) and the Service Plan that we
 8 agree to provide you.”); August 1, 2002 Terms & Conditions (Dkt. # 175-2) Ex. 3 at
 9 SPRINT-PCS-HO 000047 (same).)² The arbitration clauses relied upon by Sprint PCS in
 10 its motion to compel arbitration are contained within the Terms & Conditions applicable
 11 to the time periods of Plaintiffs’ relationship with Sprint PCS. (*See* Mot. to Compel Arb.
 12 (Dkt. # 253) at 3-4, 6-7; Brenner Decl. (Dkt. # 177) Ex. 6 at SPRINT-PCS HO 000118;
 13 Skok Decl. (Dkt. # 245) Ex. A at 1, 9.) Because Plaintiffs have already admitted that
 14 their relationship with Sprint PCS is governed by the Terms & Conditions, the court finds
 15 that no further discovery with regard to this issue is required.³

16 Plaintiffs also assert that they need to conduct discovery regarding when the
 17 agreements were formed. (Mot. at 5.) The court, however, finds that this avenue of
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19 ² Plaintiffs’ admissions also foreclose their arguments that they are not bound by the
 20 Terms & Conditions because they were not “necessarily” given copies of the Terms &
 21 Conditions or were not asked to sign them. (*See* Mot. at 6, n.3.)

22 ³ In addition, the court notes that Plaintiffs have both received and utilized copies of the
 21 various applicable Terms and Conditions in this litigation. (*See* Moore Decl. (Dkt. # 175-2) Exs.
 22 1, 3; Pl. Mot for Part. S.J. at 3, n.3; *see also* Brenner Decl. Exs. 2-11; Stok Decl. Exs. A, B.)

1 discovery is also foreclosed because there is no factual issue to resolve. There is no
 2 dispute that Mr. Hesse became a Sprint PCS customer on December 12, 2011 (*see*
 3 Consol. Compl. ¶ 2.1; 2d Straub Decl.(Dkt. # 72) ¶ 6), and that Mr. Olson became a
 4 Sprint PCS customer on May 22, 2002 (*see* Consol. Compl. ¶ 2.1; 2d Straub Decl. ¶ 5).⁴
 5 Plaintiffs have admitted that Mr. Hesse cancelled his service with Sprint in February
 6 2006, and Mr. Olson terminated his service in late 2010. (Pl. Resp. to Renewed S.J. at 4.)
 7 The class period is from March 16, 2002 to the present. (*See* Dkt. ## 160, 171.)
 8 Accordingly, the court finds that there is no factual dispute concerning when the contracts
 9 at issue here were formed, or the time period defining the Terms of Service at issue, and
 10 thus no need for discovery on this topic. When Plaintiffs cannot show how allowing
 11 additional discovery would bear on the outcome of the pending motion, the court acts
 12 within its discretion in denying such a request. *See Panatronic USA v. AT&T Corp.*, 287
 13 F.3d 840, 846 (9th Cir. 2002).

14 Finally, Plaintiffs assert that they need discovery regarding the alleged
 15 unconscionability of the arbitration clauses – specifically whether they will be able to
 16 effectively vindicate their statutory rights in the arbitral forum. (*See* Mot. at 7-8; Reply at
 17 4-6.) In *Green Tree Financial Corporation – Alabama v. Randolph*, 531 U.S. 70 (2000),
 18 the Supreme Court stated that “[i]t may well be that the existence of large arbitration
 19 costs could preclude a litigant . . . from effectively vindicating her federal statutory rights

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 21 ⁴ (*See also* Pl. Resp. to Renewed S.J. (Dkt. # 231) at 3 (“Named Plaintiff Christopher
 22 Hesse began subscribing to Sprint in December 2001, and Nathaniel Olson began subscribing in
 May 2002.”).)

1 in the arbitral forum.” *Id.* at 90. Numerous courts have required discovery on such
2 issues prior to ruling on a motion to compel arbitration. *See, e.g., Newton v. Clearwire*
3 *Corp.*, No. 2:11-CV-00783-WBS-DAD, 2011 WL 4458971, at *6-*8 (E.D. Cal. Sept. 23,
4 2011) (permitting limited pre-arbitration discovery regarding unconscionability); *Plows*,
5 2011 WL 3501872, at *5 (permitting four months to conduct discovery on the
6 enforceability of the arbitration agreement); *Laguna*, 2011 WL 3176469, at *7
7 (permitting limited discovery, narrowly tailored to determining whether arbitration clause
8 is enforceable under state law); *Hamby v. Power Toyota Irvine*, 798 F. Supp. 2d 1163,
9 1164-65 (S.D. Cal. 2011) (permitting limited pre-arbitration discovery on issue of
10 unconscionability); *Larsen v. J.P. Morgan Chase Bank, N.A.*, Nos. 10-12936, 10-12937,
11 2011 WL 3794755, at *1 (11th Cir. Aug. 26, 2011) (vacating district court order which
12 denied a motion to stay pending arbitration and remanding with instructions to reconsider
13 in light of the Supreme Court’s decision in *Concepcion* and that “discovery is to be
14 limited to issues bearing significantly on the arbitrability of this dispute until the question
15 of arbitrability has been decided.”). Accordingly, Plaintiffs’ motion for discovery is
16 granted with respect to the narrow issue of whether the arbitration clauses at issue would
17 permit Plaintiffs to vindicate their statutory rights.

18 The court, nevertheless, recognizes that there are potentially substantive issues
19 with respect to Plaintiffs’ reliance on *Green Tree*. First, Plaintiffs are asserting state, and
20 not federal, statutory rights. “[I]t is not clear that *Green Tree*’s solicitude for the
21 vindication of rights applies to rights arising under state law. . . .” *Kaltwasser v. AT&T*
22 *Mobility, LLC*, --- F. Supp. 2d ---, 2011 WL 4381748, at *5 (W.D. Wash. Sept. 20, 2011).

1 Further, “even assuming that *Green Tree* applies to state law claims, the notion that
 2 arbitration must never prevent a plaintiff from vindicating a claim is inconsistent with
 3 *Concepcion.*” *Id.* Indeed, another court within this district has concluded that “[i]f
 4 *Green Tree* has any continuing applicability, it must be confined to circumstances in
 5 which a plaintiff argues that costs specific to the arbitration process, such as filing fees
 6 and arbitrator’s fees, prevent her from vindicating her claims.” *Id.* at *6.

7 Although the court notes the foregoing issues, it declines, in the context of this
 8 motion to compel discovery, to make any substantive rulings concerning the continued
 9 viability of *Green Tree* following the Supreme Court’s ruling in *Concepcion* or its
 10 applicability to this dispute. The court prefers instead to consider such issues (if
 11 required) in the context of Defendants’ motion to compel arbitration (Dkt. # 253) and
 12 upon a complete record following the ordered discovery. The court, however, cautions
 13 the parties that the present order compelling limited discovery is by no means a license
 14 for Plaintiffs to embark on a fishing expedition, and in light of the court’s comments
 15 above should be narrowly construed. The court’s role at this juncture “is strictly limited
 16 to determining arbitrability and enforcing agreements to arbitrate.” *See Chiron Corp. v.*
 17 *Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000) (internal quotation
 18 marks omitted).

19 **IV. CONCLUSION**

20 Based on the foregoing, the court GRANTS in part and DENIES in part Plaintiffs’
 21 motion for discovery (Dkt. # 256) concerning Defendants’ motion to compel arbitration.
 22 Plaintiffs may conduct discovery on the narrow issue described above. Plaintiffs shall

1 have sixty (60) days in which to conduct the referenced discovery from the date of this
2 order. Plaintiffs' discovery shall be limited to ten interrogatories, ten requests for
3 production of documents, and one Federal Rule of Civil Procedure 30(b)(6) deposition.
4 *See Fed. R. Civ. P. 26(b), 26(c)* (providing the court with the authority and discretion to
5 limit the frequency and extent of discovery). The court encourages the parties to work
6 cooperatively to complete the ordered discovery as expeditiously as possible, and to
7 consider utilizing the procedures set forth in Local Rule CR 7(i) with regard to any
8 disputes that may arise concerning the discovery permitted by this order. *See W.D.*
9 Wash. Local Rules CR 7(i). Finally, the court STRIKES Defendants' pending motion to
10 compel arbitration (Dkt. # 253), but without prejudice to re-filing within 21 days
11 following the close of this limited 60-day discovery period.

12 Dated this 9th day of January, 2012.

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16 JAMES L. ROBART
United States District Judge